STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: November 10, 2022)

IN RE: ALL INDIVIDUAL KUGEL MESH CASES	**:** **:**	**"Master Docket" PC-2008-9999**

DECISION

GIBNEY, P.J. Plaintiff Rickie Patton (Patton), through his attorney John Deaton (Deaton), seeks disbursement of his allocated portion of the Qualified Settlement Fund (the QSF) established by this Court in connection with the global settlement agreement that resolved Patton's claims against Defendants C.R. Bard, Inc. and Davol, Inc. (the Kugel Mesh Defendants). Before the Court for decision is a Motion to Stay Proceedings (Motion to Stay) filed by intervening party The Law Offices of Steven M. Johnson, P.C. d/b/a The Johnson Law Firm (JLF). Jurisdiction is pursuant to 9 U.S.C. §§ 2 and 3 and G.L. 1956 §§ 8-2-14, 10-3-2, and 10-3-3.

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Facts and Travel

The current proceedings are but one part of a long-lived, "multi-front chess match" amongst Patton, Deaton, and JLF. *Deaton v. Johnson*, No. 20-78WES, 2020 WL 4673834, at *1 (D.R.I. Aug. 12, 2020) (remanding case to state court). In April 2007, Patton retained JLF, a Texas law firm, to pursue his personal injury claims against the Kugel Mesh Defendants. (JLF's Mot. to Stay Proceedings (Mot. to Stay) 3). To that end, Patton and JLF—through JLF's principal, Steven M. Johnson (Steven Johnson)—executed an Attorney Representation Agreement (the ARA). *See generally* Mot. to Stay Ex. 1 (ARA). The ARA contains severability and Texas choice of law provisions; provides for a contingent attorneys' fee of "ONE THIRD (33 1/3%) of all sums recovered[,]" whether "by way of settlement, judgment or otherwise"; states that "[a]fter the above

fees are deducted, client shall pay to attorneys, ONLY OUT OF THE CLIENT'S SHARE OF THE RECOVERY AND NOT OUT OF CLIENT'S POCKET, all court costs and expenses, advanced by the attorneys in connection with said matter"; and provides JLF with a lien on any recovery "as security for the payment of attorneys' fees and expenses[.]" *Id.* at ¶¶ 3-4, 8, 10. Paragraphs 16, 17, and 18 of the ARA (the Arbitration Provisions) state that "any dispute[s] arising from the interpretation, performance, or breach" of the ARA "shall be resolved by final and binding arbitration conducted in Fort Worth, Texas and administered by Judicial Arbitration and Mediation Service (JAMS)[.]" *Id.* ¶¶ 16-18. Although each of the three Arbitration Provisions is followed by a space labeled "CLIENT INITIAL HERE[,]" Patton did not initial, or otherwise sign, any of the three spaces. *Id.*

"Beginning in 2008, [JLF] engaged [Deaton], a Rhode Island attorney, to serve as local representation for 176 Kugel Mesh cases filed in this Court" and as trial counsel in *Patton v. Davol, Inc. (Patton MDL)*, C.A. No. 08-2316ML, Patton's case against the Kugel Mesh Defendants in the United States District Court for the District of Rhode Island. *In re All Individual Kugel Mesh Cases*, No. PC-2008-9999, 2020 WL 6335955, at *1 (R.I. Super. Oct. 22, 2020) (citations omitted). In exchange, JLF agreed to pay Deaton a percentage of the contingency fees that JLF recovered under its ARAs. *Id.* The *Patton MDL* case was initially slated for trial as a bellwether case; however, in November 2012, the federal court excluded an expert report proffered by Patton—through Deaton—and "the subsequent management of the case was fraught with conflict" between Patton, Deaton, and JLF. *Patton v. Johnson*, No. 17-259WES, 2018 WL 3655785, at *3 (D.R.I. Aug. 2, 2018); *see* Mot. to Stay Ex. 7 (*Patton MDL* Hr'g Tr., Nov. 9, 2012) 19:22-22:21. Ultimately, the *Patton MDL* case did not proceed to trial. *See Deaton v. Johnson*, No. 05-16-01221-CV, 2017 WL 2991939, at *1 (Tex. App. July 14, 2017).

After a protracted mediation process, the Kugel Mesh cases before this Court culminated in a global settlement memorialized in the June 2014 Master Settlement Agreement (MSA). *In re All Individual Kugel Mesh Cases*, 2020 WL 6335955, at *1. "The venue for all disputes related to the settlement was established as the 'Superior Court of Rhode Island[,]' and the global settlement agreement explicitly provided that all 'Counsel and/or Co-Counsel hereby submit himself, herself, itself or themselves to the personal jurisdiction of the Superior Court of Rhode Island.'" *Id.* (quoting *Deaton v. Johnson*, 2020 WL 4673834, at *3). In April 2015, Patton joined the global settlement by executing a Confidential Settlement Agreement and Release. (Mot. to Dis[b]urse Qualified Settlement Fund Allocations to Pl., Rickie Patton (Mot. to Disburse), Ex. B.)

Pursuant to Internal Revenue Code § 468B, in March 2016 this Court created the QSF to facilitate the resolution of the claims encompassed by the MSA and appointed Garretson Resolution Group, Inc. (Garretson)[1] as Administrator of the QSF. *See* Deposit Order (Mar. 11, 2016) (Gibney, P.J.); Stipulation to Establish QSF, Appoint Fund Administrator and Escrow Agent and Address Related Issues (QSF Stip.) ¶ 7. As Administrator, Garretson is "authorized to distribute all attorney fees and litigation expenses for Claimants, consistent with existing contingency fee contracts and, to the extent required by law, upon Court approval upon the joint motion of Claimants' Counsel and [the Kugel Mesh Defendants]." (QSF Stip. ¶ 19.)

By March 2016, however, the tension between Deaton and JLF had developed into a full-blown dispute over Deaton's entitlement to attorneys' fees from the Kugel Mesh cases resolved through the MSA. *See In re All Individual Kugel Mesh Cases*, 2020 WL 6335955, at *1. On March 7, 2016, Deaton filed a motion to compel JLF to disclose the settlement amounts and allocations

[1] Although Garretson is now known as Epiq, this Court will continue to use the name Garretson throughout the Decision. *See* Mot. to Disburse Ex. D.

and to enforce a lien for attorneys' fees on the QSF. *Id.* at *2. On March 11, 2016, after "[a]cknowledging the work by Attorney Deaton witnessed by this Court and performed relative to the mediation overseen by this Court," this Court entered an order "providing that $1 million be segregated within the QSF to be distributed only upon further order of this Court." *Id.*

The messy dénouement of the *Patton MDL* case—and Patton's subsequent decision to settle his Kugel Mesh claims—spawned further litigation over the parties' competing allegations of legal malpractice. *See Patton v. Johnson*, 2018 WL 3655785, at *3. "On April 4, 2016, Barry Johnson, who worked with JLF in Texas on Patton's case," filed suit against JLF and Patton in a Texas state court and sought "an order compelling the parties to arbitrate all disputes between the parties, including legal malpractice claims asserted by Patton against Barry Johnson or JLF."[2] *Deaton v. Johnson*, 2017 WL 2991939, at *2. JLF then filed multiple crossclaims against Deaton with respect to Deaton's representation of Patton and other JLF clients and sought its own order compelling arbitration. *Id.* After Patton and Deaton disputed the Texas state court's jurisdiction over their persons, the Texas County Court denied both challenges; "Deaton appealed, and the Texas Court of Appeals affirmed." *Patton v. Johnson*, 915 F.3d 827, 831 (1st Cir. 2019) (citing *Deaton v. Johnson*, 2017 WL 2991939, at *4).

During the pendency of Deaton's jurisdictional appeal, JLF initiated a JAMS arbitration proceeding against Patton before Arbitrator Hugh Hackney (Hackney) in Fort Worth, Texas. *Id.* In response, Patton argued that JLF could not enforce the Arbitration Provisions of the ARA because Patton had never agreed to those provisions. *See id.*; *see also* Mot. to Stay Ex. 8 (Hackney Decision) 31-33 ("The question presented in [Patton]'s Motion to Dismiss the Arbitration may be

[2] As multiple courts have had occasion to note, Barry Johnson "apparently is not related to attorney Steven M. Johnson[.]" *See Patton v. Johnson*, No. 17-259WES, 2018 WL 3655785, at *1 (D.R.I. Aug. 2, 2018); *see also Patton v. Johnson*, 915 F.3d 827, 830 n.2 (1st Cir. 2019).

summarized as whether or not [Patton] agreed to and is contractually bound by the arbitration clause contained in [the ARA].”). After reviewing the ARA and affidavits from both sides, Hackney concluded that “‘[Patton] failed to agree to arbitrate any dispute arising out of [the ARA] he signed with [JLF], although he did agree to be represented by [JLF].’” *Patton v. Johnson*, 2018 WL 3655785, at *3, *7 (quoting Mot. to Stay Ex. 8 (Hackney Decision) 33). Accordingly, on November 15, 2016, Hackney dismissed the arbitration proceedings for lack of jurisdiction. (Mot. to Stay Ex. 8 (Hackney Decision) 33.)

In April 2017, Patton (and his wife Cathleen Marquardt) sued Barry Johnson, JLF, and Steven Johnson in Rhode Island Superior Court for legal malpractice and other claims arising from Patton’s Kugel Mesh case. *See Patton*, 915 F.3d at 831. After the defendants removed the case to the United States District Court for the District of Rhode Island, Barry Johnson—but not JLF or Steven Johnson—moved to stay proceedings and compel arbitration under the Arbitration Provisions of Patton’s ARA. *See id.* at 832. However, a federal magistrate judge concluded—and the district court agreed—that Barry Johnson was collaterally estopped from relitigating whether Patton had agreed to the ARA’s Arbitration Provisions. *See Patton v. Johnson*, 2018 WL 3655785, at *1, *5-9.

The magistrate judge, after noting that a party seeking to vacate the decision of an arbitrator bears a heavy burden, found that the Hackney Decision “relied on the lack of initials or signatures in the spaces meant for them as evidence of the lack of an agreement; it did not rest only on a rigid legal requirement that [arbitration] clauses must always be signed.” *Id.* at *6. “Thus, at worst, [Hackney] was guilty of a harmless misstatement of applicable law concerning the requirement of signatures, at the same time that his analysis [was] properly focused on the facts evidencing the formation of an agreement.” *See id.*; *see also id.* at *7 (citing *Oxford Health Plans LLC v. Sutter*,

569 U.S. 564, 573 (2013)) ("JLF chose arbitration, and it must now live with that choice. The Arbitrator's interpretation of the ARA's arbitration clauses went against JLF, maybe mistakenly so. JLF does not get to rerun the matter in a court or in a second arbitration."). Applying Rhode Island law, the magistrate judge also found that "Barry Johnson should be collaterally estopped from relitigating the precise issue−whether Patton agreed to the ARA's arbitration clauses−that was actually determined by the [Hackney Decision]." *See id.* at *9; *see also id.* at *7 (quoting *E.W. Audet & Sons, Inc. v. Fireman's Fund Insurance Co. of Newark, New Jersey*, 635 A.2d 1181, 1186 (R.I. 1994)) ("[C]ollateral estoppel requires: '(1) that there be an identity of issues, (2) that the prior proceeding resulted in a final judgment on the merits, and (3) that the party against whom collateral estoppel is asserted be the same as or in privity with a party in the prior proceeding.'"). Barry Johnson's motion to stay and to compel arbitration was therefore denied. *Id.* at *9.

Barry Johnson appealed from that denial, and on February 11, 2019, the First Circuit Court of Appeals affirmed the decision of the District Court and remanded the case for further proceedings. *See Patton*, 915 F.3d at 838. In its decision, the First Circuit found that Patton and JLF had "clearly and unmistakably accepted the proposition that [Hackney] possessed the requisite authority to determine whether claims arising under the ARA were arbitrable" and that Barry Johnson had waived his argument that Texas law, rather than Rhode Island law, should govern the collateral estoppel analysis. *See id.* at 834-38.

As Barry Johnson pursued his appeal in the First Circuit, Steven Johnson and JLF focused on their efforts to compel Patton to arbitration through the Texas state court proceedings, which had been stayed during Deaton's jurisdictional appeal. *See* JLF's Mot. to Stay Ex. 2 (Massengale Decision) 41. Although the full record of the Texas state court proceedings is not currently before this Court, a subsequent procedural history compiled by JAMS Arbitrator Michael Massengale

(Massengale) indicates that JLF and Steven Johnson's motion to compel arbitration was renewed on July 2, 2018 and was opposed by Patton. *Id.* at 41-42. JLF asserted that the Hackney Decision was void because case law applying the Federal Arbitration Act (FAA) indicates that, in the absence of the parties' clear and unmistakable consent, the threshold issue of arbitrability must be determined by a court rather than an arbitrator. *Id.* at 42. Patton responded by arguing that both he and JLF had agreed to allow Hackney to determine the issue of arbitrability. *Id.* Among other arguments, JLF also asserted that, even if Hackney's initial ruling on the Arbitration Provisions was correct, Patton's subsequent filing of his malpractice suit in Rhode Island estopped him from avoiding the Arbitration Provisions under the doctrine of direct-benefits estoppel. *Id.* at 43.

After holding an initial hearing on August 24, 2018 and receiving additional briefing from JLF and Patton, the Texas state court held a February 1, 2019 hearing where Barry Johnson appeared and joined in JLF's motion to compel arbitration. *Id.* at 43-44. Subsequently, on February 22, 2019—eleven days after the First Circuit issued its decision—the Texas state court issued an Order staying proceedings and compelling Barry Johnson, Steven Johnson, JLF, and Patton to arbitration. *Id.* at 44. The Order, which appears to have been drafted by counsel for Steven Johnson and JLF, reads in full:

> "Came on to be heard on the 24th day of August, 2018, and reset and heard further on February 1, 2019, *Defendant's Motion to Compel Arbitration and Plaintiff's Joinder in the same* and the Court, after review of pleadings on file and hearing the argument of counsel, and at the February 1, 2019, hearing Plaintiff BARRY JOHNSON consented to arbitration and agreed to being compelled to Arbitration with Defendants, further, BARRY JONSON [*sic*] agrees and signs below to submit to this *Order*, is of the opinion same should be GRANTED.
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> "IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that all claims against and between Defendants STEVEN M. JOHNSON, Individually and LAW OFFICES OF STEVEN M. JOHNSON, P.C., d/b/a THE JOHNSON LAW FIRM and Defendant RICKIE PATTON are ordered to binding arbitration.

> "IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all claims against and between Defendants STEVEN M. JOHNSON, Individually and LAW OFFICES OF STEVEN M. JOHNSON, P.C., d/b/a THE JOHNSON LAW FIRM and Plaintiff BARRY JOHNSON are ordered to binding arbitration.
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> "IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all claims against and between Plaintiff BARRY JOHNSON and Defendant RICKIE PATTON are ordered to binding arbitration.
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> "IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the arbitration is to be facilitated in accordance with the April 27, 2007 Attorney Representation Agreement.
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> "IT IS SO ORDERED." *Johnson v. Patton et al.*, No. CC-16-01688-A (Dall. Cnty. Ct., filed Feb. 22, 2019) (Texas State Court Order).

On March 4, 2019, JLF and Steven Johnson filed a demand for JAMS arbitration (the 2019 JAMS Arbitration) against Patton and Barry Johnson. (Mot. to Stay Ex. 2 (Massengale Decision) 45.) Arbitration commenced on March 13, 2019 but was later stayed pending the resolution of Patton's appeal from the Texas State Court Order. *See Patton v. Johnson*, No. 4:19-cv-00698-O, at 3 (N.D. Tex., filed Dec. 20, 2019) (Texas Federal Court Order). On October 28, 2019, the Texas Court of Appeals dismissed Patton's appeal for lack of jurisdiction after finding that review of the Texas State Court Order was foreclosed by the FAA and the Texas Arbitration Act (TAA), neither of which permit an interlocutory appeal from an order compelling arbitration. *See Patton v. Johnson*, No. 05-19-00314-CV, 2019 WL 5541255, at *2 (Tex. App. Oct. 28, 2019). After Patton filed a motion for rehearing, the Texas Court of Appeals vacated its previous opinion and filed a new opinion and judgment on March 19, 2020, which also dismissed Patton's appeal from an order compelling arbitration for lack of jurisdiction.[3] *See Patton v. Johnson*, No. 05-19-00314-CV, 2020 WL 1303278 (Tex. App. Mar. 19, 2020).

[3] The primary substantive difference is that the new opinion notes that the Texas State Court Order lacked the mandatory stay required by the TAA and that Barry Johnson filed a counterclaim and cross-claim after the order was entered; however, those facts did not change the Texas Court of

Returning to the federal front, on September 9, 2019, after a remand from the First Circuit's decision and on a contested motion by the defendants, a federal magistrate judge transferred Patton's legal malpractice case against JLF, Steven Johnson, and Barry Johnson from the District of Rhode Island to the Northern District of Texas. *See Patton v. Johnson*, No. 17-259WES, 2019 WL 4193412, at *3 (D.R.I. Sept. 4, 2019) ("All the applicable private and public interest factors tip towards transfer to the Northern District of Texas."). In that decision, the federal magistrate judge noted the existence of the recent actions in Texas state court, including the order compelling arbitration; nevertheless, the finding that the ARA's arbitration provisions were unenforceable remained the law of the case in the federal litigation. *See id.* at *2 n.7, *5 ("[JLF's] § 1404(a) motion was timely made right on the heels of the final resolution of its failed attempt to enforce the ARA's Texas venue/arbitration clause[.]").

In fact, the magistrate judge noted that Patton had moved for an injunction against the Texas state court proceedings in order to protect the First Circuit's "judgment that the parties are bound by" the Hackney Decision; however, having already concluded that the case should be transferred, the magistrate judge found that Patton's request for injunctive relief should be addressed by the Northern District of Texas. *Id.* at *2 n.7, *4. In turn, while the defendants' motion to transfer also asked the court to dismiss or stay the action in favor of the new round of arbitration in Texas, the magistrate judge also declined to reach those issues. *Id.* at *4 ("A final factor leaning towards a Texas transfer is that the parties' war over arbitration rages on, now entirely in Texas.").

After the transfer of venue was complete, JLF filed a motion to stay proceedings and compel arbitration in the Northern District of Texas on November 27, 2019. (Texas Federal Court

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Appeals' finding that the Texas State Court Order was not an appealable final judgment. *See* Mot. to Stay. Ex. 19 at 2, 7.

Order, No. 4:19-cv-00698-O, at 5.) JLF advanced two arguments in favor of arbitrability: (1) that Patton was precluded from relitigating the question of arbitrability under the doctrine of collateral estoppel, and (2) that the federal court should, if it chose to make an independent determination of the question, find that Patton had agreed to arbitration under the ARA. *Id.* at 4. The federal court set an expedited briefing schedule and required Patton to respond by December 9, 2019; however, Patton did not file a timely response. *Id.* at 1. On December 20, 2019, the federal court issued an order concluding that the text of the ARA's Arbitration Provisions showed that "the parties clearly ha[d] an agreement to arbitrate at least some claims." *Id.* at 4-5. Accordingly, the court did not address the collateral estoppel issue. *Id.* at 4. Having also found that Patton's malpractice claims arose from the ARA, the federal court granted JLF's motion. *Id.* at 5-6.

On December 23, 2019, Patton filed a motion for reconsideration and asked the federal court to revisit its order compelling arbitration. *Patton v. Johnson*, No. 4:19-CV-00698-O, 2020 WL 13504980, at *1 (N.D. Tex. Mar. 9, 2020) (Reconsideration Order). Patton argued that, although his Rhode Island counsel had prepared a timely objection to JLF's motion to compel arbitration, that attorney was unable to file the objection in the Northern District of Texas because he was not barred in Texas. *Id.* at *2. Patton also asserted that, despite his best efforts, he was unable to find local counsel in Texas until after the federal court's deadline had passed. *Id.* However, on March 9, 2020, after finding that Patton's "failure to timely file [his] objections does not entitle [Patton] to the Court's reconsideration[,]" the federal court denied Patton's motion for reconsideration on procedural grounds and declined to address the merits of Patton's objection to JLF's motion to compel arbitration. *Id.* at *3.

Before the 2019 JAMS Arbitration could begin in earnest, Patton raised another challenge to the arbitrability of the dispute within the arbitration itself. (Mot. to Stay Ex. 2 (Ashworth

Decision) 32.) In a May 20, 2020 interim ruling, JAMS Arbitrator Glen M. Ashworth (Ashworth), having been selected as the parties' sole arbitrator, noted that both sides raised competing collateral estoppel arguments; however, before "any analysis of [those] issues [was] addressed," Ashworth found that the Texas State Court Order and the Texas Federal Court Order prohibited him from reviewing the question of arbitrability at all. *Id.* at 33 ("For this Arbitrator to presumptuously engage in a subsequent review of these Courts' Orders would exceed the legal authority of this tribunal.").

Accordingly, Ashworth denied Patton's challenge and held that the arbitration could proceed, but subsequently recused himself as arbitrator. *Id.*; Mot. to Stay Ex. 2 (Massengale Decision) 46. Patton then filed a new motion to deny arbitrability on January 25, 2021. (Mot. to Stay Ex. 2 (Massengale Decision) 35.) As the newly appointed arbitrator, Massengale denied the motion on March 22, 2021. *Id.* at4 51. Although Massengale, at Patton's request, gave no deference to the Ashworth Decision, he reached essentially the same conclusion; namely, that he had "no authority" to revisit and overturn the Texas State Court Order and the Texas Federal Court Order, both of which had compelled the dispute to arbitration. *Id.* at 46 n.7, 51.

On August 13, 2021, Massengale issued a "Final Award resolv[ing] all issues submitted for decision" in the 2019 JAMS Arbitration. (Mot. to Disburse Ex. C (2021 Final Award) 32.) Massengale found that Patton's failure to prove the "necessary element" of damages by showing that "he would have obtained a better result by opting-out of his allocated share of the negotiated settlement" was fatal to his legal malpractice claims against JLF, Steven Johnson, and Barry Johnson. *Id.* at 13. Patton had also advanced multiple claims that JLF, Steven Johnson, and Barry Johnson had breached their fiduciary duties toward Patton, including by failing to disclose material information in connection with Patton's acceptance of his proposed settlement. *See id.* at 16, 26.

This dispute centered around Patton's understanding of the net effect of his acceptance given the existence of pre-existing liens against his potential recovery. *See id.* at 23-27. On this issue, Massengale found that—"despite [Patton's] repeated inquiries"—JLF withheld the "bottom line" information that "the effect of releasing his claims and accepting the [settlement] could have been a net-negative result for him." *Id.* at 27-28. Massengale also found that "Patton was confused and mistaken about several variables potentially affecting his ultimate net recovery, such that he erroneously concluded that accepting the settlement likely would result in a net recovery of around $55,000" and that JLF "did not correct his misunderstandings when it had opportunities to do so prior to Patton signing the second and final release." *Id.* at 28. However, because Massengale also found that Patton could not establish that JLF or the other respondents withheld the information—or took any other actions—in service of their own adverse interests, Massengale held that Patton had not proved an actionable breach of fiduciary duty. *See id.* at 16-17, 28-30.

Massengale also addressed a breach of contract counterclaim advanced by JLF and the other respondents against Patton to recover attorneys' fees under the ARA. *See id.* at 30-32. On this issue, after noting that the ARA provides that JLF's attorneys' fee is "'CONTINGENT ON WHAT IS RECOVERED in this matter by way of settlement, judgment or otherwise[,]'" Massengale found that "nothing has yet been 'recovered' on Patton's claim because the funds ha[d] not been disbursed" from the QSF:

> "Under the administration of the aggregate settlement arranged by [JLF], Garretson evaluates the appropriateness of the attorney's fee before deducting it from a client's allocated portion of the settlement when the funds are distributed. Garretson has not yet made that determination, no funds have been distributed in this matter, and thus [JLF] ha[s] not proven by preponderance of the evidence that Patton breached the [ARA] by failing to pay them $60,000 out of pocket as the contingent fee purportedly owed on a settlement that has not yet been recovered by these parties." *Id.* at 32 (footnotes omitted).

Accordingly, Massengale denied JLF's counterclaim as well. *Id.*

Garretson made the next move, seeking to disburse Patton's settlement in the wake of the 2021 Final Award, but was prevented from fully doing so by Deaton and JLF's "impasse regarding attorney expenses and attorney fees (at least with respect to who should receive payment for them)." *See* Mot. to Disburse Ex. D (von Saucken Letter, Apr. 9, 2022) 1; *see also* Mot. to Stay Ex. 23A. In an April 9, 2022 letter to JLF's counsel and Deaton (as Patton's counsel), Sylvius von Saucken (von Saucken) of Garretson asserted that JLF's request for $57,791.19 in attorneys' fees and $65,571.94 in costs—though supported by a list of itemized expenses and four checks showing that JLF had reimbursed Deaton for $57,746.03 in expenses—would leave Patton with a net recovery of only $296.29. *See* von Saucken Letter, Apr. 9, 2022, 3 ("We submit that is not a reasonable result!"). In turn, von Saucken acknowledged that the Referral Agreement between Deaton and Steven Johnson provided that Deaton would receive all attorneys' fees from Patton's recovery and remit one-third of those fees to Steven Johnson; however, von Saucken questioned how Deaton could purport to unilaterally waive all expenses on Patton's behalf. *Id.* at 1-3.

In an effort to find a mutually acceptable solution, von Saucken outlined his August 2021 disbursement plan for Patton's "available monies of $159,519.65" [4] from the QSF as follows:

> "Take the adjusted gross settlement amount [of $159,519.65], reduce it by [the $57,791.19] in attorney fees, and then divide the remaining amount by two, creating one share for attorney expenses and another share for Rickie Patton, each equal to $50,864.23:
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> "1) Pay Rickie Patton $15,004,

[4] As von Saucken explained, Patton's allocated gross settlement amount was initially larger; however, $7,986.97 had been set aside as Patton's pro rata share of the $1 million holdback implemented by this Court's March 11, 2016 Order. *See* von Saucken Letter, Apr. 9, 2022, 1 n.1. Another portion was deducted as a Multi-District Litigation (MDL) fee. *Id.*

> "2) Pay attorney fees of $57,791.19 to Deaton [Law Firm],[5]
> "3) Pay attorney expenses of $50,864.23 [to JLF],
> "4) Pay the [Blue Cross Blue Shield of Louisiana (BCBSLA)] federal employer plan repayment obligation of $33,157.91, and
> "5) Pay [Garretson] fees of $2,702.32.
>
> "For the attorneys' share, this results in a $14,707.72 expense reduction, which reimburses 77.58% of [JLF's] original submitted expenses [of $65,571.94]. And for Rickie Patton's share, after paying the BCBSLA federal lien obligation, and [Garretson]'s fees (which to date [Garretson] has not taken), his remaining balance is $15,004." *Id.* at 3.

Neither Deaton nor JLF agreed to this plan. *Id.* at 4. In his correspondence with von Saucken, Deaton asserted that, as Patton's attorney, he was entitled to receive the full settlement amount in trust for Patton and would then pay the $33,157.91 lien asserted against Patton by Blue Cross Blue Shield of Louisiana (BCBSLA). *See generally* Mot. to Stay Exs. 23B, 23C. With regard to JLF's claim for attorneys' fees from Patton's recovery, Deaton asserted that, pursuant to his referral agreement with JLF, it would be his responsibility to pay JLF whatever fees it was owed. (Mot. to Stay Ex. 23C, 2.) Deaton also asserted that, because he had initially paid the litigation expenses for Patton's Kugel Mesh case, he was entitled to waive those expenses, but that JLF could always choose to seek reimbursement from Deaton after Patton's money was disbursed. *Id.*; *see* Mot. to Stay Ex. 23B, 6 ("It is not [Garretson]'s responsibility to decide the merits of any claims asserted by [JLF]. [JLF] can continue to assert those claims against Mr. Patton and my law firm. It is time for Mr. Patton to be paid.").

Conversely, JLF's counsel responded to von Saucken's January 6, 2022 e-mail, deferring the issue of attorneys' fees and expenses for further determination through arbitration, but asserting that Garretson's fiduciary duties extended to JLF's entitlement to recover its fees and expenses

[5] Based on the larger context of the April 9, 2022 letter, von Saucken evidently contemplated that Deaton would then be responsible for remitting one-third of the attorneys' fees to JLF, as per the parties' referral agreement. *Id.* at 1-2.

from Patton's settlement. (Mot. to Stay Ex. 23E, 1-2 (asserting entitlement to $57,791.19 in attorneys' fees and $65,571.94 in expenses).) After providing documentation for JLF's claimed expenses, JLF's counsel went on to state that JLF had a lien on Patton's recovery for all amounts it was owed pursuant to the ARA, and that in light of what it viewed as Patton's assertion of frivolous claims, JLF was "not willing to waive its right to recover all fees, costs and expenses so that Mr. Patton may be paid some amount that [Garretson] believes is 'equitable.'" *Id.* at 2. However, acknowledging that von Saucken—and Massengale, during the 2019 JAMS Arbitration—had indicated that Garretson was solely responsible for the determination of charges and distributions from the QSF, JLF's counsel asserted that any such distributions would not constitute a waiver of JLF's claims. *Id.*

In an April 9, 2022 letter, after acknowledging the disagreement over the issues of attorneys' fees and expenses, von Saucken set an April 14, 2022 deadline for Deaton and JLF to agree to the "50/50 net plan"; otherwise, Garretson planned to hire Rhode Island counsel to: (1) bring "the contract questions inherent" in the parties' disagreement before this Court; (2) "request to interplead the funds with the court registry and walk away"; and (3) ask the Court to "determine each entity's respective payment." (von Saucken Letter, Apr. 9, 2022, 4.) Neither Deaton nor JLF agreed. Deaton, in his capacity as Patton's counsel, continued to request that Garretson "honor the referral system" and rely on him to send JLF the appropriate fees and costs. (Mot. to Stay Ex. 23G, 1-2.) Recognizing that Garretson preferred that this Court resolve the issue, Deaton stated that Patton would file the appropriate motion to disburse. *Id.* at 2.

JLF's counsel, while acknowledging that Garretson "as administrator of the settlement and QSF is solely, exclusively, and unilaterally in control of and responsible for the settlement funds, their distribution, and all aspects of the administration of the settlement and funds," stated that von

Saucken's plan was inconsistent with JLF's contractual rights to recover attorneys' fees and costs from Patton under the ARA. (Mot. to Stay Ex. 23H, 1-2.) He also stated that, in light of the long history of its dispute with Patton and Deaton, JLF was left with "no choice but to demand that [Patton] honor all of his obligations under the ARA." *Id.* Nevertheless, JLF had no objection to Garretson disbursing $15,004 to Patton, "provided that [Garretson] confirms in writing that any distribution is made subject to JLF's retention of all rights that it has against Mr. Patton and/or Mr. Deaton." *Id.* at 2. On April 23, 2022, von Saucken acknowledged the agreement regarding the distribution of the $15,004 and then sent that amount to Deaton, as Trustee for Patton, on May 18, 2022. (Mot. to Stay Exs. 23I, 23J.) Von Saucken also stated that the payment would not affect JLF's rights against Patton or Deaton and that "[a]ll other monies associated with Rickie Patton's Kugel Mesh settlement will remain in the Fund pending further discussions." (Mot. to Stay Ex. 23I.)

On May 2, 2022, Patton, through Deaton, filed his Motion to Disburse in this Court, seeking the disbursement of Patton's allocation of the QSF, less the "applicable Multi-District Litigation ("MDL") fee and any fees owed to [Garretson], as administrator of the QSF[,]" to Deaton as Trustee for Patton. (Mot. to Disburse 1.) Patton's Motion to Disburse also avers that, pursuant to the Referral Agreement between Deaton and Steven Johnson, Deaton is to receive the attorneys' fees from Patton's recovery and is solely responsible for bringing any claims for litigation expenses. *Id.*

On May 20, 2022—one day after JLF filed a new demand for JAMS arbitration against Patton in Texas—JLF filed a Motion to Intervene in this action along with the instant Motion to Stay. *See* Mot. to Stay Ex. 2 (2022 JAMS Filing) 4-12; Mot. to Intervene 5. Through the Motion to Stay, JLF argues that the Court should stay consideration of Patton's Motion to Disburse for

two independent reasons. *See* Mot. to Stay 1. First, JLF asserts that the FAA and the Rhode Island Arbitration Act (RIAA) require this Court to stay the proceedings because Patton's Motion to Disburse raises issues that are referable to arbitration under a valid agreement to arbitrate. *Id.* To support the subsidiary claim that the ARA's Arbitration Provisions are enforceable against Patton, JLF raises multiple arguments, including the claims that Patton is precluded from challenging the validity of the Arbitration Provisions under the doctrines of collateral estoppel and direct-benefits estoppel. *See generally id.* at 9-26.

Second, JLF argues this Court should stay the proceedings under Rule 11 of the Rhode Island Supreme Court Rules of Appellate Procedure (Appellate Rule 11) because aspects of Patton's Motion are involved in JLF's pending appeal to the Rhode Island Supreme Court from this Court's October 22, 2020 Decision. *Id.* at 1-2, 29-30. In that Decision, after Deaton had filed a motion to disburse the segregated $1 million portion of the QSF, JLF filed a motion to stay proceedings in favor of arbitration; however, this Court denied JLF's motion to stay after finding that no agreement to arbitrate existed between Deaton and JLF. *See In re All Individual Kugel Mesh Cases*, 2020 WL 6335955, at *5.

On May 25, 2022, JLF filed a Motion to Continue Hearing on Patton's Motion to Disburse, asking that the Court decide JLF's Motion to Stay before reaching the Motion to Disburse. *See* JLF's Mot. to Continue Hr'g on [Patton]'s Mot. to Disburse 4. This Court then conducted a hearing on May 27, 2022, at which it granted JLF's Motion to Intervene and heard the parties' arguments on JLF's Motion to Stay. *See generally* Hr'g Tr., May 27, 2022. The Court also granted JLF's request to defer its deadline for filing a substantive response to Patton's Motion to Disburse until after this Court's ruling on the Motion to Stay. *See id.* 3:22-23, 39:16-20.

On June 23, 2022, the United States District Court for the Northern District of Texas confirmed the 2021 Final Award. *Patton v. Johnson,* No. 4:19-CV-00698-O, 2022 WL 3012537, at *1 (N.D. Tex. June 23, 2022) (2022 Confirmation Order). The federal court noted that Patton had objected to JLF's application to confirm the 2021 Final Award and had filed his own motion, in which he challenged arbitration and the court's order compelling arbitration and moved to vacate the 2021 Final Award. *See id.* After noting the limited grounds available under the FAA for avoiding the judicial confirmation of an arbitration award, the federal court found that Patton had relied primarily on his "previously rejected" argument that "there [was] no valid arbitration agreement" between himself and JLF—an issue that the federal court declined to revisit. *Id.* (citing 9 U.S.C. § 9 and stating "[t]his arbitration award is the result of the arbitration ordered by this Court after the Court determined Patton's claims against JLF were covered by a valid and binding arbitration clause."). Accordingly, the federal court confirmed the 2021 Final Award in its entirety. *Id.*

II

Standard of Review

A

The RIAA and the FAA

Under § 10-3-3 of the Rhode Island Arbitration Act (the RIAA),

> "[i]f any suit or proceeding be brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the suit is pending, upon being satisfied that the issue involved in the suit or proceeding is referable to arbitration under such an agreement, shall, on application of one of the parties, stay the trial of the action until the arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with the arbitration." Section 10-3-3.[6]

[6] Compare 9 U.S.C. § 3, which states:

As that statutory language indicates, if the Court is "satisfied that the issue involved in the suit or proceeding is referable to arbitration" under an enforceable agreement to arbitrate, a stay of litigation pending arbitration is mandatory. Section 10-3-3; *see, e.g., Bjartmarz v. Pinnacle Real Estate Tax Service*, 771 A.2d 124, 126-27 (R.I. 2001). "'The issue of whether a dispute is arbitrable is a question of law[.]'" *Rhode Island Council on Postsecondary Education v. Hellenic Society Paideia - Rhode Island Chapter (Hellenic Society)*, 202 A.3d 931, 934 (R.I. 2019) (quoting *Town of Johnston v. Rhode Island Council 94, AFSCME, Local 1491*, 159 A.3d 83, 85 (R.I. 2017)). "Arbitration is a creature of the agreement between the parties, and a 'duty to arbitrate a dispute arises only when a party agrees to arbitration in clear and unequivocal language, and even then, the party is only obligated to arbitrate issues that it explicitly agreed to arbitrate.'" *Id.* (quoting *State Department of Corrections v. Rhode Island Brotherhood of Correctional Officers*, 866 A.2d 1241, 1247 (R.I. 2005)). Under the FAA, which applies to transactions involving interstate commerce, "[s]tates are able to regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of *any* contract." *McBurney v. The GM Card*, 869 A.2d 586, 590 (R.I. 2005) (quoting *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995)) (internal quotation marks omitted).

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

B

Appellate Rule 11

Under Appellate Rule 11,

> "From the time of the docketing of an appeal in the Supreme Court, the Court shall have exclusive jurisdiction to supervise the further course of such appeal and enter such orders as may be appropriate, including orders of dismissal for failure to comply with these rules, either on motion of a party or on its own motion. Notwithstanding the provisions of this subsection, if further proceedings are pending in the Superior, Family, or District Court over aspects of the case not involved in the appeal or petition for review after the case has been docketed in the Supreme Court in accordance with Rule 10(c), any party wishing to seek a stay of such proceedings shall proceed in the first instance to the trial court, or thereafter by motion to the Supreme Court, which shall determine if a stay is warranted pending the resolution of the appeal." R.I. Sup. Ct. Art. I, R. 11(f).

Thus, in "cases where an appeal is interlocutory and there are further proceedings contemplated in the trial court over aspects of the case not involving the appeal[,] . . . the trial court proceedings do not automatically cease until the appeal is resolved." 2 David A. Wollin, *Rhode Island Civil and Appellate Procedure* § 11:4 at 106 (2022). "Rather, the trial court shall decide in the first instance whether further proceedings should continue and retains the authority to act." *Id.*

III

Analysis

A

JLF's Pending Appeal from this Court's October 2020 Decision

Separate and apart from its extensive arguments relating to the arbitrability of its dispute with Patton, JLF contends that this Court must stay the current proceedings because JLF's appeal of this Court's October 2020 Decision to the Rhode Island Supreme Court divested this Court of jurisdiction over this matter. *See* Mot. to Stay 30 (citation omitted) ("The Master Docket reflects

that it was 'certified to [the] Supreme Court' on December 14, 2020 and the matter was docketed in the Supreme Court on December 23, 2020 . . . . Accordingly, the Superior Court lacks jurisdiction to consider Patton's Motion."). As the text of Appellate Rule 11(f) indicates, however, where "aspects of the case not involved in the appeal" are subject to further proceedings at the Superior Court level, the Court retains the authority to "determine" in the first instance "if a stay is warranted pending the resolution of the appeal." R.I. Sup. Ct. Art. I, R. 11(f).

Here, Patton's Motion to Disburse his allocated portion of the QSF concerns "aspects of the case not involved" in the pending appeal, which derives from JLF's unsuccessful attempt to stay proceedings on Deaton's motion to disburse the $1 million segregated portion of the QSF. R.I. Sup. Ct. Art. I, R. 11(f). In his April 9, 2022 letter regarding his proposed disbursement of Patton's funds, von Saucken indicated that Garretson had set aside Patton's pro rata share of the segregated funds in accordance with this Court's instructions. *Compare* von Saucken Letter, Apr. 9, 2022, 1 n.1, *with* Mot. to Stay 29 ("A substantial portion . . . of the funds Patton seeks to have disbursed to him are the subject of [Deaton]'s Motion to Disburse, which was filed in the same 'Master Docket' in which Patton files his Motion."). Although JLF correctly asserts that Patton's Motion to Disburse includes a request for his pro rata share of the segregated funds that Deaton also seeks, the Court sees no reason why—having retained authority over the segregated funds through its March 2016 Order—it could not avoid any conflict by deferring the disbursal of those specific funds. *See In re All Individual Kugel Mesh Cases*, 2020 WL 6335955, at *2; Mot. to Stay 30; Mot. to Disburse 1.

As a result, the Court has not been automatically divested of its jurisdiction over Patton's Motion to Disburse and must "determine if a stay is warranted pending the resolution of the appeal." R.I. Sup. Ct. Art. I, R. 11(f). In the Court's view, given JLF's extensive arguments

regarding its entitlement to a stay pending arbitration, the question of whether Patton's Motion to Disburse raises issues that are referable to arbitration under an enforceable arbitration agreement must take center stage in the inquiry. *See Bjartmarz*, 771 A.2d at 127; *see also State v. Lead Industries Association, Inc.*, 69 A.3d 1304, 1312 (R.I. 2013) (quoting *Hartman v. Carter*, 121 R.I. 1, 5, 393 A.2d 1102, 1105 (1978)) ("[A] trial justice exercises proper discretion when the final determination is 'in the light of reason as applied to all the facts and with a view to the rights of all the parties to the action while having a regard for what is right and equitable under the circumstances and the law.'"). Accordingly, the Court will first address that dispositive issue before deciding—if necessary—whether a discretionary stay pending the resolution of JLF's appeal is warranted.

B

Arbitrability and Collateral Estoppel

JLF's primary argument for the enforceability of the ARA's Arbitration Provisions is that Patton is collaterally estopped from arguing that the Arbitration Provisions are unenforceable. (Mot. to Stay 10.) In support, JLF points to two prior decisions: (1) the February 22, 2019 decision of the County Court of Dallas County, Texas ordering Patton and JLF to arbitration in a case filed by Barry Johnson against Patton, Steven Johnson, and JLF; and (2) the December 20, 2019 decision of the United States District Court for the Northern District of Texas staying proceedings and compelling arbitration in the legal malpractice suit filed by Patton and Marquardt against Barry Johnson, Steven Johnson, and JLF. *See id.* at 11; *see also* Texas State Court Order, No. CC-16-01688-A; Texas Federal Court Order, No. 4:19-cv-00698-O. JLF asserts that the issue of arbitrability has been fully and fairly litigated in its favor through both the Texas State Court Order and the Texas Federal Court Order and represents that these decisions are sufficiently final and

"procedurally definite" to warrant preclusive effect. (Mot. to Stay 13.) With respect to the Texas State Court Order, JLF contends that the issue of collateral estoppel takes on a constitutional dimension under the Full Faith and Credit Clause. *Id.* at 14. JLF also avers that the Court should give preclusive effect to two recent arbitration decisions declining to reverse either the Texas State Court Order or the Texas Federal Court Order on the issue of arbitrability. *See id.* at 15; *see also* Mot. to Stay Ex. 2 (Ashworth Decision) 30-34; Mot. to Stay Ex. 2 (Massengale Decision) 35-51.

For Patton's part, he argues that it is the First Circuit's decision that should now receive preclusive effect and emphasizes that JLF has repeatedly sought to avoid the implications of the Hackney Decision by seeking multiple bites at the apple in different forums. *See* Hr'g Tr. 20:7-21:25, May 27, 2022.

The procedural posture of this case implicates the preclusive value of multiple decisions of both state and federal courts in Texas.[7] The constitutional principle of full faith and credit "'generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it.'" *Hawes v. Reilly*, 184 A.3d 661, 666 (R.I. 2018) (quoting *Durfee v. Duke*, 375 U.S. 106, 109 (1963)). Conversely, "a combination of constitutional and statutory considerations requires state courts to give *res judicata* effect to the judgments of federal courts." *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529 (9th Cir. 1985)). "Full faith and credit is not required, however, when a decree is interlocutory or subject to modification under the law of the rendering state." *See Bard v. Charles R. Myers Insurance Agency, Inc.*, 839 S.W.2d 791, 794 (Tex. 1992) (citations omitted); *see also Hawes*, 184

[7] The ARA—separately and apart from the disputed Arbitration Provisions—stipulates that the parties' agreement "shall be construed in accordance with the laws of the State of Texas[.]" (Mot. to Stay Ex. 1 (ARA) ¶ 10.) "'[A]s a general rule, parties are permitted to agree that the law of a particular jurisdiction will govern their transaction.'" *McBurney v. The GM Card*, 869 A.2d 586, 589 (R.I. 2005) (quoting *Terrace Group v. Vermont Castings, Inc.*, 753 A.2d 350, 353 (R.I. 2000)).

A.3d at 667 (quoting *Durfee*, 375 U.S. at 111) ("'[T]he general rule [is] that a judgment is entitled to full faith and credit . . . when the second court's inquiry discloses that those questions have been *fully and fairly litigated* and *finally decided* in the court which rendered the original judgment.'").

"Collateral estoppel, or issue preclusion, bars the relitigation of identical issues of fact or law that were actually litigated and essential to the final judgment in a prior suit." *JPMorgan Chase Bank, N.A. v. Professional Pharmacy II*, 508 S.W.3d 391, 416 (Tex. App. 2014) (citing *Barr v. Resolution Trust Corp. ex rel. Sunbelt Federal Savings*, 837 S.W.2d 627, 628 (Tex. 1992)). Under Texas law,

> "[a] party seeking to assert the bar of collateral estoppel must establish that
> "(1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action;
> "(2) those facts were essential to the judgment in the first action; and
> "(3) the parties were cast as adversaries in the first action." *Sysco Food Services, Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994) (citations omitted).

In addition, under Texas law, "for purposes of collateral estoppel there need not necessarily be a final judgment on the merits." *City of San Antonio v. Cortes*, 468 S.W.3d 580, 586 (Tex. App. 2015). "Instead, the test for finality is 'whether the conclusion in question is procedurally definite.'" *Id.* (quoting *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 385 (Tex. 1985)). "The factors to be considered in answering this question include whether 'the parties were fully heard, [whether] the court supported its decision with a reasoned opinion [and whether] the decision was subject to appeal or was in fact reviewed on appeal.'" *Id.* (quoting *Van Dyke*, 697 S.W.2d at 385); *see Walker v. Wilburn*, No. 3:13-CV-4896-D, 2018 WL 5848857, at *9 (N.D. Tex. Nov. 8, 2018) (citations omitted) (stating that, under Texas law, finality analysis falls "under the 'full and fair litigation' prong" of collateral estoppel, as "the finality of a prior order indicates that it was 'adequately deliberated and firm'"). Texas has also "adopt[ed] the rule of the *Restatement*

(Second) of Judgments § 13, and [held] that a judgment is final for the purposes of issue and claim preclusion 'despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo.'" *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

A relevant example of these principles in action is *Cortes*, where a Texas Court of Appeals applied the doctrine of collateral estoppel to hold that a firefighter who brought claims against his municipal employer under a collective bargaining agreement (CBA) was barred "from relitigating the issue of whether his claims should be referred to arbitration." *Cortes*, 468 S.W.3d at 584. In a prior action, after the firefighter's union had sued the municipality under the CBA, the Texas Court of Appeals reversed a trial court's denial of the municipality's motion to compel arbitration after finding that the union's claims fell within the scope of a valid arbitration agreement in the CBA. *See id.* at 584-85 (citing *City of San Antonio v. International Association of Fire Fighters, Local 624*, Nos. 04-12-00783-CV & 04-13-00109-CV, 2013 WL 5508408 (Tex. App. 2013)). As a result, the *Cortes* court found that "the issue of whether the parties should be compelled to arbitration pursuant to the CBA was fully and fairly litigated in the first proceeding" and was essential to that proceeding's outcome. *Id.* at 586 (citing *International Association of Fire Fighters, Local 624*, 2013 WL 5508408, at *1-8). The *Cortes* court also found that the "issue of whether the parties should be compelled to arbitration [was] final for purposes of collateral estoppel" despite the lack of a final judgment on the merits in the first proceeding, as the parties had been fully heard on the issue at both the trial and appellate levels. *Id.* at 586-87. On the third element, the *Cortes* court held that the firefighter was in privity with his union. *Id.* at 587.

In the instant case, the profusion of competing prior judgments also implicates the "last in time" rule, which provides that "[i]f two or more courts render inconsistent judgments on the same claim or issue, a subsequent court is normally bound to follow the most recent determination that

satisfies the requirements of *res judicata*." *See Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988) (citing *Americana Fabrics, Inc.*, 754 F.2d at 1529-30); *see also Browning v. Navarro*, 887 F.2d 553, 563 (5th Cir. 1989) ("The [Restatement] position, which is also called the last in time rule, is the law in Texas and, therefore, controls this appeal."). "The formal rationale behind the rule is that the implicit or explicit decision of the second court, to the effect that the first court's judgment is not *res judicata*, is itself *res judicata* and therefore binding on the third court." *Americana Fabrics, Inc.*, 754 F.2d at 1530 (citing *Porter v. Wilson*, 419 F.2d 254, 259 (9th Cir. 1970)). "The rule furthers the purposes of *res judicata* because it 'end[s] the chain of relitigation . . . by stopping it where it [stands]' after entry of the second court's judgment, and thereby discourages relitigation in a third court." *Id.* (quoting *Porter*, 419 F.2d at 259).

Significantly, the last in time rule is "equally applicable when there are three or more prior inconsistent proceedings." *Id.* at 1530 n.2 (citing *Porter*, 419 F.2d at 259). "In other words, a court's failure to follow the rule does not deprive that court's judgment of *res judicata* effect." *Id.* However, at least one commentator has cautioned that, "[a]t a minimum, the existence of inconsistent adjudications should require careful examination of the quality of the opportunity to litigate the [subsequent] action[s]." 18 Wright & Miller, *Federal Practice & Procedure* § 4423 (3d ed. 2020). "Texas courts have also recognized that at bottom issue preclusion is driven by equitable principles[;] [t]herefore, they reserve the discretion to decline to apply it when the results would be unfair." *See State Farm Fire & Casualty Co. v. Fullerton*, 118 F.3d 374, 386 (5th Cir. 1997) (citing *Scurlock Oil Co.*, 724 S.W.2d at 7); *see also Trapnell*, 890 S.W.2d at 803 (citing *Lytle v. Household Manufacturing Inc.*, 494 U.S. 545, 553 (1990)) ("[W]e agree with the court of appeals' resolution of this case because we do not believe that the purposes of the doctrine of collateral estoppel would be served by applying it to these facts.").

At least in theory, the path out of this matter's procedural morass is thus apparent: the Court must identify the most recent decision that is entitled to preclusive effect on the question of the enforceability of the ARA's Arbitration Provisions. The first candidate is the decision of the Northern District of Texas to confirm the 2021 Final Award.[8] *See* 2022 Confirmation Order, 2022 WL 3012537, at *1. The 2022 Confirmation Order easily satisfies the third element of collateral estoppel under Texas law, as Patton and JLF were adversarial parties to that decision.[9] *See id.*; *see also Trapnell*, 890 S.W.2d at 801. The second element, that the issue was essential to the judgment, is also present: although the federal court ultimately rejected Patton's arguments that no valid and enforceable arbitration agreement existed, such a finding would have indicated that Massengale "exceeded [his] powers" in issuing the 2021 Final Award. *See* 9 U.S.C. § 10(4); *see also* 2022 Confirmation Order, 2022 WL 3012537, at *1. *Cf. Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 299 (2010) ("Arbitration is strictly 'a matter of consent,' . . . and thus 'is a way to resolve those disputes—*but only those disputes*—that the parties

[8] In fact, the 2022 Confirmation Order postdates JLF's Motion to Stay and the subsequent hearing; as such, JLF has not focused on this decision in its collateral estoppel arguments. *See* Mot. to Stay 15 (referencing "pending motion to confirm" the 2021 Final Award). Nevertheless, as a final judgment entered by a federal court, the 2022 Confirmation Order is susceptible to judicial notice. *See, e.g.*, *Goodrow v. Bank of America*, N.A., 184 A.3d 1121, 1126 (R.I. 2018) (holding that hearing justice could properly take judicial notice of plaintiff's "federal district court complaint and the order dismissing it"); *cf. Foster-Glocester Regional School Committee v. Board of Review*, 854 A.2d 1008, 1015 n.4 (R.I. 2004) ("Under these circumstances, the District Court should have inquired whether the Superior Court had confirmed the [arbitration] award and it should have taken judicial notice of same.").

[9] As a federal diversity judgment, the preclusive effect of the 2022 Confirmation Order is determined by reference to Texas law. *See Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001); *see also Patton v. Johnson*, No. 17-259WES, 2019 WL 4193412, at *2 (D.R.I. Sept. 4, 2019) ("Because Plaintiffs still both resided in Louisiana, while JLF and Barry Johnson were citizens of Texas, this malpractice/tort case was removed to this Court based on diversity of citizenship."); *id.* at *2 n.8 (citations omitted) ("Plaintiffs' move to Texas likely makes them now citizens of Texas, where all Defendants are also citizens. This does not divest the Court of diversity jurisdiction over the case.").

have agreed to submit to arbitration[.]"); *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 139-40 (7th Cir. 1985) ("If there had been no arbitration clause, or if the [defendants] had claimed that the clause was invalid and nevertheless the arbitrator had gone ahead and made an award against them, he might well (in the first case, clearly would) have exceeded his powers.").

Also relevant to the second element is Patton's unflagging resistance to the validity of the Arbitration Provisions, which he pressed through the challenges to arbitrability that resulted in the Ashworth and Massengale Decisions. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the United States Supreme Court held that if the parties to an arbitration "did *not* agree to submit the arbitrability question itself to arbitration," then a court tasked with reviewing a subsequent arbitration award "should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently." *First Options of Chicago, Inc.*, 514 U.S. at 943. The Court also found that "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be effectively bound by the arbitrator's decision on that point." *Id.* at 946 ("To the contrary, insofar as the Kaplans were forcefully objecting to the arbitrators deciding their dispute with First Options, one naturally would think that they did *not* want the arbitrators to have binding authority over them.").

The Court therefore upheld the Third Circuit's decision, when presented with an arbitration award resolving the merits of the dispute, to independently review the disputed question of arbitrability and vacate the award after finding that no enforceable agreement to arbitrate existed. *See id.* at 941; *see also id.* at 947-48 (quoting *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1509 (3d Cir. 1994)) (stating that a court of appeals' review of "a district court decision confirming an arbitration award on the ground that the parties agreed to submit their dispute to

arbitration[ ] should proceed like review of any other district court decision finding an agreement between parties" by "accepting findings of fact that are not 'clearly erroneous' but deciding questions of law *de novo*"). Accordingly, the Northern District of Texas could not enter the 2022 Confirmation Order without ensuring that Patton and JLF's dispute was arbitrable.

The question of whether the issue of arbitrability was "fully and fairly litigated" through the 2022 Confirmation Order merits closer scrutiny. *Trapnell*, 890 S.W.2d at 801. "Texas courts ask not whether the issue to be precluded could have been litigated, but whether it was actually litigated—whether it was 'adequately deliberated and firm.'" *State Farm Fire & Casualty Co.*, 118 F.3d at 382 (quoting *Mower v. Boyer*, 811 S.W.2d 560, 563 (Tex. 1991)). "Three factors are especially important in analyzing the question of full and fair litigation: '1) whether the parties were fully heard, 2) whether the court supported its decision with a reasoned opinion, and 3) whether the decision was subject to appeal or was in fact reviewed on appeal.'" *See id.* (quoting *Rexrode v. Bazar*, 937 S.W.2d 614, 617 (Tex. App. 1997)); *see also Van Dyke*, 697 S.W.2d at 384 (quoting Restatement (Second) *Judgments* § 27 cmt. d (1982)) ("[A]ctual litigation occurs '[w]hen an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'").

In the 2022 Confirmation Order, the federal judge found that Patton's motion challenging arbitration, challenging the court's order compelling arbitration, and moving to vacate the 2021 Final Award "rehash[ed] arguments previously rejected by [the] Court—that there is no valid arbitration agreement." (2022 Confirmation Order, 2022 WL 3012537, at *1.) Citing the previous Texas Federal Court Order and Reconsideration Order, the federal judge then denied Patton's motion, stating, "[o]nce again, for the reasons previously stated, the Court disagrees." *Id.* ("This arbitration award is the result of the arbitration ordered by this Court after the Court determined

Patton's claims against JLF were covered by a valid and binding arbitration clause."). As previously outlined, the Texas Federal Court Order compelling arbitration was granted on JLF's unopposed motion due to Patton's failure to file a timely objection; in that Order, the federal court declined to decide the issue of collateral estoppel after finding that the text of the ARA's Arbitration Provisions indicated that "the parties clearly have an agreement to arbitrate at least some claims." (Texas Federal Court Order, No. 4:19-cv-00698-O, at 4-5.) Patton then filed a motion for reconsideration along with his belated objection to the motion to compel; however, the federal court denied the motion for reconsideration and expressly declined to reach the merits of Patton's objection. (Reconsideration Order, 2020 WL 13504980, at *3.)

The extent to which the federal court "'supported its decision with a reasoned opinion'" is thus debatable. *See Fullerton*, 118 F.3d at 382 (quoting *Rexrode*, 937 S.W.2d at 617); *see also id.* (quoting *Scurlock Oil Co.*, 724 S.W.2d at 7) (relating "full and fair litigation" factors to Texas rule that use of certain type of settlement "can cast doubt on the fairness of an earlier judgment and can give a trial court reason to use its discretion to re-open issues because of misgivings about the 'quality or extensiveness of the procedures' in the earlier suit"). Even so, the question of the Arbitration Provisions' enforceability was raised before the federal court. *See Rexrode*, 937 S.W.2d at 617 (quoting *Van Dyke*, 697 S.W.2d at 384) ("For the purposes of collateral estoppel, an issue was 'actually litigated' when it was properly raised, by the pleadings or otherwise, and it was submitted for determination, and determined."). Patton's filings in support of his motion to vacate, and in opposition to JLF's motion to confirm, raised multiple arguments to support his contention that the Arbitration Provisions were unenforceable—including that the Texas Federal Court Order compelling arbitration violated the doctrines of collateral estoppel and the law of the

case.[10] *See* Br. Supp. Pls.' Mot. Challenging Arbitration, Challenging Order Compelling Arbitration, Mot. Vacate Arbitration Award, and Req. for Stay at 8-9, 12-14, *Patton*, 2022 WL 3012537 (No. 4:19-CV-00698-O), ECF 75; Br. Supp. Pls' Resp. Opp'n Defs.' Appl. to Confirm Final Arbitration Award, *Patton*, 2022 WL 3012537 (No. 4:19-CV-00698-O), ECF 92 (incorporating contents of Patton's prior filings by reference). Patton thus placed the issue of arbitrability, with its multiple facets, squarely before the federal court. *Cf. Mower*, 811 S.W.2d at 562 (finding that parties were not fully heard on an issue that "was not expressly raised or decided").

Additionally, the 2022 Confirmation Order was a final judgment that was "'subject to appeal[,]'" thereby providing Patton with the ability to directly challenge the federal court's disposition of his arguments. *Fullerton*, 118 F.3d at 382 (quoting *Rexrode*, 937 S.W.2d at 617); *see, e.g.*, *DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 312 (5th Cir. 2011) (reversing district court's order confirming arbitration award against defendants because defendants "were not personally bound by the arbitration agreements that their corporations entered into, and therefore the arbitration panel lacked jurisdiction to render an award against them"); *see also Americana Fabrics, Inc.*, 754 F.2d at 1530 (citations omitted) ("If an aggrieved party believes that the second court erred in not giving *res judicata* effect to the first court's judgment, then the proper avenue of redress is appeal of the second court's judgment, not collateral attack in a third court.").

[10] Again, "a court may take judicial notice of court records[,]" although our Supreme Court has cautioned that "judicial notice should 'only apply to those aspects of a court record that cannot be reasonably disputed.'" *Curreri v. Saint*, 126 A.3d 482, 485-86 (R.I. 2015) (quoting *In re Michael A.*, 552 A.2d 368, 370 (R.I. 1989)). That requirement is satisfied here because the Court is only taking notice of the parties' filings in the Northern District of Texas to establish the fact that those filings contain certain arguments.

As a result, the Court concludes that the 2022 Confirmation Order's determination that a valid arbitration agreement exists between Patton and JLF satisfies the elements of collateral estoppel under Texas law. *Cf. Cortes*, 468 S.W.3d at 586-87. Applying the doctrine of collateral estoppel to the instant matter would also advance the "three goals of issue preclusion" as articulated by the Texas Supreme Court: "the conservation of judicial resources, the protection of defendants from repetitive lawsuits, and the prevention of inconsistent judgments." *Fullerton*, 118 F.3d at 386 (citing *Trapnell*, 890 S.W.2d at 803-04). The Court recognizes that the prior invocations of collateral estoppel throughout the history of this matter have thoroughly failed to achieve those goals; nevertheless, that is no reason to compound the problem by adding a new chapter to the parties' procedural epic. This Court's retention of continuing jurisdiction over the QSF, which was established in part to "ensure that all common benefit fund expenses, medical liens, other appropriate expenses, legal fees and costs were paid, and that net proceeds would be distributed to Kugel Mesh claimants who chose to participate in the settlement[,]" did not thereby bind all claimants and their attorneys—many of whom, like Patton and Steven Johnson, reside out of state—to resolve all disputes underlying the proper calculation of their "legal fees and costs" through *de novo* hearings or mini-trials before this Court. *Deaton v. Johnson*, 2020 WL 4673834, at *3. Given the existence of a judicially confirmed—and evidently, an ongoing—arbitration proceeding between Patton and JLF, it is time to put the issue of arbitrability to bed so that the parties can resolve their remaining substantive disputes. *See* 2022 Confirmation Order, 2022 WL 3012537; Mot. to Stay Ex. 2 (2022 JAMS Filing).

In short, the 2022 Confirmation Order "is not binding because it is correct; it is binding because it is last." *Americana Fabrics, Inc.*, 754 F.2d at 1530. Patton is collaterally estopped from relitigating the enforceability of the Arbitration Proceedings before this Court.

C

Issues Referable to Arbitration

Having determined for the purposes of JLF's Motion to Stay that an enforceable agreement to arbitrate exists between Patton and JLF, the Court must next determine whether the underlying proceedings—namely, Patton's Motion to Disburse—raise issues that are "referable to arbitration under" the ARA's Arbitration Provisions. *See* § 10-3-3; *see also Rhode Island Council on Postsecondary Education*, 202 A.3d at 934 (quoting *State Department of Corrections*, 866 A.2d at 1247) ("'[A] party is only obligated to arbitrate issues that it explicitly agreed to arbitrate.'"). "[G]enerally, any doubts about the scope of an arbitration agreement must be decided in favor of arbitration." *See Cortes*, 468 S.W.3d at 583 (citing *In re D. Wilson Construction Co.*, 196 S.W.3d 774, 782 (Tex. 2006)); *see also id.* (quoting *In re FirstMerit Bank*, 52 S.W.3d 749, 754 (Tex. 2001)) ("In determining 'whether a party's claims fall within an arbitration agreement's scope, we focus on the [petition]'s factual allegations rather than the legal causes of action asserted.'"). "Once an agreement is established, a court should not deny arbitration *unless it can be said with positive assurance* that an arbitration clause is *not* susceptible of an interpretation which would cover the dispute at issue." *In re D. Wilson Construction Co.*, 196 S.W.3d at 783 (citation and quotation marks omitted); *cf. Rhode Island Council on Postsecondary Education*, 202 A.3d at 934 (quoting *School Committee of Town of North Kingstown v. Crouch*, 808 A.2d 1074, 1078 (R.I. 2002)) ("'[W]hen uncertainty exists about whether a dispute is arbitrable, this Court, like the United States Supreme Court, 'has enunciated a policy in favor of resolving any doubt in favor of arbitration.'").

As Garretson's recent communications with Deaton (as Patton's counsel) and JLF indicate, Patton and JLF vigorously dispute JLF's entitlement to attorneys' fees and expenses from Patton's

allocated portion of the QSF. *See* von Saucken Letter, Apr. 9, 2022; *see also* Mot. to Stay Exs. 23G, 23H. JLF's claim to those fees and expenses rests on the ARA between Patton and JLF. *See* Mot. to Stay Ex. 23H. The ARA's Arbitration Provisions state that "any dispute arising from the interpretation, performance, or breach" of the ARA—which also addresses attorneys' fees and expenses—"shall be resolved by final and binding arbitration[.]" (Mot. to Stay Ex. 1 (ARA) ¶¶ 3-4, 17.) The Court concludes that Patton's Motion to Disburse raises issues that are referable to arbitration under the terms of the ARA; as such, the Court must grant JLF's Motion to Stay.[11] *See* § 10-3-3; *see also Bjartmarz*, 771 A.2d at 126-27.

IV

Conclusion

For the reasons stated, JLF's Motion to Stay is granted. Counsel shall submit the appropriate order for entry.

[11] The MSA between the "JLF Kugel Mesh clients" and the Kugel Mesh Defendants "provides that the venue for all disputes is the 'Superior Court of Rhode Island' and that all 'Counsel and/or Co-Counsel hereby submit himself, herself, itself or themselves to the personal jurisdiction of the Superior Court of Rhode Island.'" *Deaton v. Johnson*, No. 20-78WES, 2020 WL 4673834, at *3 (D.R.I. Aug. 12, 2020). Those provisions of the MSA do not change the outcome, as the underlying proceedings before the Court involve a dispute between Patton and JLF over attorneys' fees and costs, rather than any dispute over the substance of the Settlement Agreement.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**In Re: All Individual Kugel Mesh Cases**
CASE NO:	**PC-2008-9999**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**November 10, 2022**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**

ATTORNEYS:

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For Defendant:	**Thomas M. Robinson, Esq.**
For Intervenor:	**Michael Daly, Esq.**